Ho Mee Luang v Dian Tong Holding Sdn Bhd (Kaca Holdings Sdn Bhd & Ors as intended interveners)

HIGH COURT (SIBU) — SUIT NO 20–22 OF 1995
TEE AH SING J
25 FEBRUARY 2000

Civil Procedure *— Parties — Intervention — Application to intervene — Execution proceedings — Intervention by persons claiming interest in land which forms the subject matter of the proceedings — Applicants had equitable right and interest in land — Whether execution debtor merely bare trustee for applicants — Whether intervention should be allowed*

Upon the application of the execution creditor, a prohibitory order was granted against the entire parcel of land owned by the execution debtor. The execution debtor had sold sublots 6 and 11 of the land to Kaca Holdings Sdn Bhd ('Kaca'). The purchase price was duly paid to the execution debtor upon signing of the sale and purchase agreement and the memorandum of transfer were executed in favour of Kaca. Kaca had lodged caveats against sublots 6 and 11. Sublot 7 of the land was sold to Ting Lung ('Ting') and Wong Ng Suok ('Wong'). The sum of RM200,000 was duly paid to the execution debtor upon the execution of the sale and purchase agreement, leaving a balance of RM50,000 which was to be paid within 30 days after the release of the title deed. Ting and Wong had lodged a caveat against sublot 7. Kaca, Ting and Wong applied for an order that leave be granted to them to be added as intervener and that the prohibitory so far as it purported to affect sublots 6, 11 and 7 of the land be set aside.

Held:

(1) Kaca, Ting and Wong had proved that they were persons claiming interest in sublots 6, 11 and 7 of the land which were the subject matter of the execution proceedings. Their rights and interests in the sublots were directly affected by the prohibitory order and the summons for directions which included an order for sale of the land. Therefore, the court granted leave for them to intervene (see p 143E–G).

(2) Kaca had an equitable right and interest in sublots 6 and 11. The execution debtor was a bare trustee for Kaca in respect of sublots 6 and 11. The execution creditor could only seize and sell what was left of the execution debtor's interest in sublots 6 and 11. The execution debtor had no more interest in the sublots which could be attached by prohibitory order. Therefore, the court ordered that sublots 6 and 11 should be excluded from the prohibitory order (see p 145A–D).

(3) Ting and Wong were the beneficial owners of sublot 7 and the execution debtor held the legal estate in sublot 7 as a bare trustee for Ting and Wong. The execution debtor only had a limited interest in sublot 7 as only RM50,000 of the purchase price

remained unpaid. Therefore the execution creditor could only seize and sell what was left of the execution debtor's interest and estate in sublot 7. The court ordered that only $^1/_5$ undivided share of sublot 7 could be attached by the prohibitory order (see p 145E–G).

[Bahasa Malaysia summary

Di atas permohonan pemiutang pelaksanaan, suatu perintah larangan telah diberikan terhadap keseluruhan bidang tanah yang dimiliki oleh penghutang pelaksanaan. Penghutang pelaksanaan telah menjual sublot 6 dan 11 kepada Kaca Holding Sdn Bhd ('Kaca'). Harga belian telah dibayar kepada penghutang pelaksanaan selepas menandatangani perjanjian jual-beli dan memorandum pindah milik yang memihak kepada Kaca telah dilaksanakan. Kaca telah memasukkan kaveat-kaveat terhadap sublot 6 dan 11. Sublot 7 tanah tersebut telah dijual kepada Ting Lung ('Ting') dan Wong Ng Suok ('Wong'). Jumlah RM200,000 telah dibayar kepada penghutang pelaksanaan selepas pelaksanaan perjanjian jual-beli, dan tinggal baki sebanyak RM50,000 yang perlu dibayar dalam masa 30 hari selepas pemberian suratikatan hak milik. Ting dan Wong telah memasukkan suatu kaveat ke atas sublot 7. Kaca, Ting dan Wong telah memohon untuk perintah bahawa kebenaran diberikan kepada mereka untuk ditambah sebagai pencelah dan halangan tersebut, sejauh ia dikatakan menjejaskan sublot 6, 11 dan 7 tanah tersebut diketepikan.

Diputuskan:

(1) Kaca, Ting dan Wong telah membuktikan bahawa mereka adalah pihak-pihak yang menuntut kepentingan di dalam sublot 6, 11 dan 7 tanah tersebut yang merupakan subjek perkara prosiding-prosiding pelaksanaan. Hak-hak dan kepentingan-kepentingan mereka di dalam sublot-sublot dijejas terus oleh perintah halangan dan saman untuk arahan yang termasuk perintah jualan tanah tersebut. Oleh itu, mahkamah telah memberikan kebenaran kepada mereka untuk mencelah (lihat ms 143E–G).

(2) Kaca mempunyai hak dan kepentingan ekuiti di dalam sublot 6 dan 11. Penghutang pelaksanaan adalah pemegang amanah ('bare trustee') untuk Kaca berkenaan dengan sublot 6 dan 11. Pemiutang pelaksanaan hanya boleh menyita dan menjual baki kepentingan penghutang pelaksanaan di dalam sublot 6 dan 11. Penghutang pelaksanaan tidak mempunyai kepentingan di dalam sublot yang boleh ditahan melalui perintah halangan tersebut (lihat ms 145A–D).

(3) Ting dan Wong adalah tuan punya benefisial sublot 7 dan penghutang pelaksanaan memegang estet di bawah undang-undang di dalam sublot 7 sebagai pemegang amanah (bare trustee) untuk Ting dan Wong. Penghutang pelaksanaan hanya

mempunyai kepentingan yang terhad di dalam sublot 7 oleh kerana hanya RM50,000 harga belian yang tinggal belum dibayar. Oleh itu, pemiutang pelaksanaan hanya boleh menyita dan menjual baki kepentingan penghutang penghakiman dan estet di dalam sublot 7. Mahkamah mengarahkan bahawa $^{1}/_{5}$ bahagian yang tidak terbahagi berkenaan sublot 7 boleh ditahan oleh perintah halangan tersebut (lihat ms 145E–G).]

Notes

For cases on intervention, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reisssue) paras 3278–3295.

Cases referred to

Karuppiah Chettiar v Subramaniam [1971] 2 MLJ 116 (refd)

Soo Hong & Leong Kew Moi & Ors v United Malayan Banking Corp Bhd & Anor [1997] 1 MLJ 690 (refd)

Legislation referred to

National Land Code 1965 ss 143(1), 143(2), 143(3, 148(1), 148(2)(a), 148(2)(b), 148(2)(c)

Rules of the High Court 1980 O 83

Wong Sing Nang (*Wong, Orlando Chua & Co*) for the plaintiff/execution creditor.

Kilat Beriak (*Chew, Jugah, Wan Ullok & Co*) for the applicant/intended inervener Kaca Holdings Sdn Bhd.

Michele Lau (*Lau & Co*) for the applicant/intended interveners Ting Lung & Wong Ngi Suok.

Cur Adv Vult

Tee Ah Sing J: On 11 April 1998 upon the application of the execution creditor, a prohibitory order over Dian Tong Holding Sdn Bhd's ('the execution debtor') entire parcel of land described as Lot 1393 Block 7 Sibu Town District ('the said land') was granted.

By a summons in chambers dated 5 December 1998, Kaca Holdings Sdn Bhd ('Kaca') applied for an order that leave be granted to Kaca to be added as an intervener and that the prohibitory order dated 11 April 1998 and subsequent extension of its validity by the court in so far as it purports to affect sublots 6 and 11 of the said land be set aside.

By two separate sale and purchase agreements both dated 30 September 1993, the execution debtor as the registered proprietor of the said land sold to Kaca sublots 6 and 11 of the said land together with one unit of four-storey shophouse each to be erected on the said sublots 6 and 11.

The purchase price of the said sublots 6 and 11 in the sum of RM280,000 and RM300,000 respectively was duly paid to the execution

debtor upon signing of the two aforesaid sale and purchase agreements on or about 30 September 1993. A

After the signing of the sale and purchase agreements and the payment of the full purchase prices of sublots 6 and 11 comprised in the said land on or about 30 September 1993, the execution debtor as well as Kaca executed the memorandum of transfer in respect of the said sublots in favour of Kaca. The memoranda of transfers were prepared and kept in the custody of Messrs Tang & Tang, Wahap & Ngumbang Advocates, Sibu as solicitors for Kaca awaiting their registration with the Land and Survey Department, Sibu upon issue of separate document of titles in respect of the said sublots 6 and 11. The same were received by Kaca from them recently (see paras 3 and 4 of the affidavit of Datuk Kenneth Kanyan ak Temenggong Koh affirmed on 30 July 1999). B C

In the aforesaid sale and purchase agreements, it is recited that the said land is now still charged to one Ho Mee Luang (f) ('the chargee') under two existing memorandum of charge Nos L 10025/89 and L 11755/91 ('the charges'). D

On 27 March 1996, Kaca lodged two caveats against the said land vide instrument No L 003198/1996 and L 003199/1996 ('the said caveats') prohibiting dealings affecting sublots 6 and 11 of the said land.

By a summons in chambers dated 4 May 1999, Ting Lung (f) and Wong Ngi Suok (f) ('Ting and Wong') applied for an order that leave be granted to Ting and Wong to be added as interveners in the application for execution and that the prohibitory order dated 11 April 1998 and subsequent extension of its validity by the court in so far as it purports to affect sublot 7 of the said land be set aside. E

By a sale and purchase agreement dated 9 September 1993, the execution debtor as the registered proprietor of the said land sold to Ting and Wong sublot 7 of the said land together with one unit of four-storey shophouse to be erected thereon for the consideration of RM250,000. The sum of RM200,000 was duly paid to the execution debtor upon the execution of the said sale and purchase agreement, leaving a balance sum of RM50,000 which is to be paid within 30 days after the release of the title deed of the said sublot 7. F G

On 3 December 1993, a caveat was lodged by their solicitor William Lau Kung Hui on behalf of them against the said land vide instrument No L11904/93 prohibiting dealings affecting sublot 7 of the said land.

In the sale and purchase agreement, it is recited that the said land is now still charged to one Ho Mee Luang (f) ('the chargee') under two existing memorandum of charge Nos L 10025/89 and L 11755/91 ('the said charges'). H

I shall first deal with the issue whether leave to intervene should be granted to Kaca and Ting and Wong.

In *Soo Hong & Leong Kew Moi & Ors v United Malayan Banking Corp Bhd & Anor* [1997] 1 MLJ 690, His Lordship Abdul Malek Ahmad JCA (delivering the judgment of the Court of Appeal) at p 698 said: I

A We hasten to add that we were immediately conscious that the facts in that case were quite distinguishable and this prompted my learned brother Mahadev Shankar JCA, who was chairing the panel, to refer learned counsel to *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52 in particular to the passage at p 55 which reads:

> 'The cases illustrate the great variety of circumstances in which it may be B sought to join an additional party to an existing action. In their Lordships' view, one of the principal objects of the rule is to enable the court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard. To achieve this object calls for a flexibility of approach which makes it C undesirable in the present case, in which the facts are unique, to attempt to lay down any general proposition which could be applicable to all cases.
>
> It has been sometimes said — as in *Moser v Marsden* [1892] 1 Ch 487 and in *Re IG Farbenindustrie AG Agreement* [1944] 1 Ch 41 — that a party may be added if his legal interest will be affected by the judgment in the D action but not if his commercial interest only would be affected. While their Lordships agree that the mere fact that a person is likely to be better off financially if a case is decided one way rather than the other is not sufficient ground to entitle him to be added as a party, they do not find the dichotomy between legal and commercial interest helpful. A better way of expressing the test is: will his rights against or liabilities to any E party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?'

Kaca has proved that it is a person claiming interest in sublots 6 and 11 of the said land which is the subject matter of the execution proceedings. Kaca's rights and interest in sublots 6 and 11 are directly affected by the prohibitory order and the summons for directions which include an order F for sale of the said land. I therefore grant leave for Kaca to intervene.

Similarly, Ting and Wong have proved that they are claiming interest in sublot 7 of the said land which is the subject matter of the execution proceedings. Their rights and interest in sublot 7 are directly affected by the prohibitory order and the summons for directions which include an order G for sale of the said land. I therefore grant leave for Ting and Wong to intervene.

I shall next deal with the issue whether the prohibitory order and the subsequent extension thereof in so far as it relates to sublots 6, 7 and 11 of the said land should be set aside.

H Section 143(1), 143(2) and 143(3) of the National Land Code 1965 ('the Land Code') provides as follows:

> (1) Whenever any estate or interest in land is intended to be charged with, or made security for, payment of any money, the registered proprietor and chargee shall execute a memorandum of charge in Form H (1) or H (2) I in the First Schedule, which memorandum shall give such description of the land as may be necessary, shall refer to the entry in the register relating thereto and shall contain a precise statement of the estate or interest intended to be charged. Any such charge may contain such other

special conditions as may have been agreed to by the parties, but shall not contain a charge over property other than land or an estate or interest in land. A

(2) If the proprietor and the chargee agree that no dealing shall be registered against the land during the period of the charge, the following covenant shall be included in the charge:

'I (We) ..... registered proprietor(s) and I (We) ..... chargee (s), hereby agree that during the period of this charge no dealing shall be registered against the property unless the chargee has given his consent to such registration.' B

(3) Upon registration of the charge the covenant shall operate as a caveat against the registration of any dealing affecting the land during the period of the charge, unless it is with the written consent of the chargee. C

Under s 143 of the Land Code by virtue of the said charges the said land is only a security for the payment of any money.

If the execution debtor as chargor of the said land defaulted in the payment of the principal sum, interest or other moneys secured by the charges or in the observance of any agreement, expressed or implied in the charges, then the execution creditor as chargee can exercise her statutory remedies under s 148 of the Land Code which relevant parts read as follows: D

(1) If default be made in the payment of the principal sum, interest or other moneys secured by a charge, or in the observance of any agreement, expressed or implied in any charge, the chargee may give to the chargor, his personal representatives or assigns, notice in writing that the chargee will resort to all available remedies unless such default be remedied. E

(2) If the chargor fails to comply with the requirements of any notice lawfully given, the chargee shall be at liberty to apply to the High Court: F

(a) for an order entitling him to enter into possession and to be registered as proprietor of the charged land;

(b) to receive the rents and profits of the charged land; or

(c) for the sale of the charged land,

and the Court after hearing the evidence may make such order as the circumstances seems just. G

The execution creditor as chargee under the charges has not made any application under s 148(2)(c) of the Land Code and O 83 of the Rules of the High Court 1980 for an order of sale of the said lands. I agree with the contention of the learned counsel for Kaca that as the execution creditor did not exercise her rights as a chargee following the requirement of s 148 of the Land Code, she is not entitled to the statutory remedies under the Land Code as a chargee. H

In Kaca's case full purchase prices have been paid upon signing of the said sale and purchase agreements. The execution debtor and Kaca have executed the memoranda of transfers on the date of execution. Caveats L 003198/96 and L 003199/96 have been duly registered in respect of sublots 6 and 11 on 1 April 1996. The effect of the transactions was to give I

Kaca an equitable right and interest in sublots 6 and 11 (see *Karuppiah Chettiar v Subramaniam* [1971] 2 MLJ 116).

In *Karuppiah Chettiar v Subramaniam* [1971] 2 MLJ 116 his Lordship Ong C J (Malaya) at p 118 said:

> In the instant case Mohamad Sharjudin having sold his entire interest in the land and received payment in full undoubtedly holds the legal estate only as a bare trustee for Subramaniam, who is the equitable owner. Want of registration cannot affect his equitable rights.
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> ...
>
> It is trite law that when the court orders the sale of a judgment debtor's property it cannot sell more than what the judgment debtor himself is entitled to sell.

The execution debtor is thus a bare trustee for Kaca in respect of the said sublots 6 and 11. The execution creditor can only seize and sell what is left of the execution debtor's interest in sublots 6 and 11. The execution debtor thus has no more interest in the said sublots 6 and 11 which could be attached by prohibitory order.

In view of the aforesaid, I order that sublots 6 and 11 should be excluded from the prohibitory order. The prohibitory order should be amended accordingly.

The costs of Kaca's application shall be paid by the execution creditor to Kaca.

In respect of Ting and Wong, it is clear that they have purchased sublot 7 and RM200,000 out of the purchase price of RM250,000 has been paid to the execution debtor upon the signing of the agreement with only the balance sum of RM50,000 left unpaid as the title deed of sublot 7 has not been issued, I am of the view that Ting and Wong are the beneficial owners of sublot 7 and the execution debtor holds the legal estate in sublot 7 as a bare trustee for Ting and Wong. The execution debtor only has limited interest in sublot 7 as only RM50,000 of the purchase price remained unpaid. Therefore the execution creditor can only seize and sell what is left of the execution debtor's interest and estate in sublot 7, namely, 50,000 over 250,000 which equals $^{1}/_{5}$ of the whole of sublot 7. As such, I order that only $^{1}/_{5}$ undivided share of sublot 7 can be attached by the prohibitory order. I order that the other $^{4}/_{5}$ undivided share of sublot 7 should be excluded from the prohibitory order. The prohibitory order should be amended accordingly. I order that $^{4}/_{5}$ of the costs of Ting and Wong's application shall be paid by the execution creditor to Ting and Wong.

Order accordingly.

Reported by Jafisah Jaafar